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No. 516

IN THE

Supreme Court of the United States

October Term, 1958

SPRINGFIELD TELEVISION BROADCASTING CORPORATION,

and

GREENFIELD TELEVISION BROADCASTING CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,

THE TRAVELERS BROADCASTING SERVICE CORPORATION, and
THE WGBH EDUCATIONAL FOUNDATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, is printed as Appendix A hereto. The basic decision of the Federal Communications Commission (R. 751-760) is reported at 22 FCC 332, and its decision denying rehearing (R. 869-872) at 23 FCC 57.

JURISDICTION

The judgment of the court below, affirming the Commission, was entered on June 19, 1958. By Order of the Chief Justice dated September 10, 1958, the time for filing a petition for a writ of certiorari was extended to November 15, 1958, pending action by this Court on petitions for certiorari in Nos. 235 and 242 (Oct. Term, 1958). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 47 U.S.C. Sec. 402(j).

QUESTIONS PRESENTED

1. Whether, in a proceeding where the impact on an existing broadcast licensee of a proposed "rule" is "particular and immediate" rather than "general and future," the Federal Communications Commission is required to consider pertinent public interest factors raised by the parties thereto, to summarize the basic facts there developed, and to draw rational and logical conclusions therefrom.

2. Whether a court is in a position to discharge its responsibility of determining whether basic policies which Congress has set forth in the governing statute are or are not being effectuated by the Commission, where the agency decision ignores relevant public interest considerations, where the conclusions do not rationally flow from the findings made, and where the result is patently and unexplainably inconsistent with the decisions of a different majority of the Commission in related proceedings decided the same day.

3. Whether principles enunciated by this Court in the *Chenery* case were incorrectly applied by the court below—in a proceeding instituted by the Commission for the purpose of determining *as a factual matter* whether the deletion of a VHF channel allocated to a given market would result in more service rather than less service (47 U.S.C. Sec. 303(g)) and where a key vote in the

Commission's subsequent 4-3 refusal to deintermix that market was predicated on an erroneous legal interpretation of 47 U.S.C. Sec. 307(b).

4. Whether this Court, in view of its actions vacating the judgments of the court below in related deintermixture cases (Nos. 235 and 242) should likewise vacate the instant judgment, inasmuch as these several proceedings were all instituted by the Commission on the same day (June 26, 1956), decided by the Commission on the same day (March 1, 1957), and (by reason of their close legal and factual interrelationship) should be reconsidered by the Commission at one and the same time.

STATUTES INVOLVED

Sections 303(g) and 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .
>
> Sec. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

STATEMENT

The proceedings before the Federal Communications Commission, giving rise to the instant petition for certiorari, stem from the fact that television broadcasting is currently furnished the public by stations operating in

two different portions of the radio spectrum—on very high frequency channels (VHF Channels 2-13) and on ultra-high frequency channels (UHF Channels 14-83). Petitioners provide a television service on UHF to substantial portions of the Connecticut River Valley,[1] and in doing so compete against a long-time VHF operation on Channel 8, New Haven, Conn. (R. 301). Over petitioners' objections and despite mounting data of recent years that UHF stations cannot long continue to operate in areas served by *two* VHF stations (see R. 331-344, 366), the Commission by the 1957 actions here challenged, authorized a *second* VHF station in the Connecticut Valley (by granting VHF Channel 3, Hartford, Conn. to respondent The Travelers Broadcasting Service Corporation)—even though that channel had been assigned to Hartford in 1952 under an allocation concept which the Commission in the interim had repudiated in its *Second Report on Deintermixture* (13 Pike & Fisher, *Radio Regulation*, 1571 (1956)).[2]

Briefly stated, the following background facts are necessary to a proper understanding of the instant controversy:

In its spectrum allocation report in 1945, the Commission made it clear that the 13 VHF channels which it there set aside for television use were all that could be spared for that purpose in the VHF portion of the spectrum, that 13 channels (later reduced to 12) were insuf-

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[1] The Connecticut River in its southerly course, after forming the boundary between Vermont and New Hampshire, bifurcates three counties in central Massachusetts (Franklin, Hampshire and Hampden) and two counties in Connecticut (Hartford and Middlesex). The southern (Massachusetts-Connecticut) half of the valley thus formed by the Connecticut River (hereinafter referred to as the Connecticut Valley) is one of the most densely populated areas in the United States with such urban centers as Middletown, New Britain, and Hartford, Conn., and Springfield, Holyoke, Northampton, and Greenfield, Mass. (cf. R. 753).

[2] Hereinafter cited as —— RR ——.

ficient to provide enough outlets for a nationwide competitive television system,[1] and that television must ultimately find a "home" in the UHF portion of the spectrum. The Commission accordingly reserved a substantial part of the UHF band for *experimental* television purposes.[2]

As television mushroomed and unforeseen interference problems arose, the Commission's belief that more television channels would be needed was soon vindicated. Accordingly, in its Sixth Report of April 14, 1952, issued after a four-year study and a four-year "freeze" on new grants (1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels theretofore authorized for television use. Basic to this 1952 report, which allocated specific channels to designated cities (see 1 RR 53:606), was the assumption (then justified but disproved by subsequent developments) that the "intermixture" of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course "an integral part of a *single*, nationwide television service" (para. 197).[3]

However, the 1952 allocation table provided for less intermixture in New England than in other portions of the United States because of two fortuitous circumstances: seven VHF channels were already being utilized

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[1] "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone, are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture* of June 26, 1956, 13 RR 1571, para. 12.

[2] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 RR Pt. III, pp. 91:97-98).

[3] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665. Emphasis supplied throughout this petition.

by "pre-freeze" stations in New York City, two in Boston, and one each in New Haven, Providence and Schenectady; these channels could not therefore be duplicated (because of mileage separations needed to avoid interference) in other cities in the highly urbanized New England region. As a result, in its Sixth Report (1 RR 53:606) the Commission was able to allocate VHF channels to only one city in the entire state of Massachusetts (Boston on the eastern seaboard), to one city in Rhode Island (Providence), to one city in eastern upstate New York (Schenectady), and to two cities in Connecticut (New Haven and Hartford).[1] Other substantial cities in Connecticut (e.g., Bridgeport, New Britain, New London, Stamford, and Waterbury), in central and western Massachusetts (e.g., Springfield, Holyoke, Greenfield, Worcester, Pittsfield and North Adams), and in eastern upstate New York (e.g., Troy, Albany, Poughkeepsie, and Kingston) were allocated UHF channels only (1 RR 53:606). These cities, in order to have their own television outlets, were thus entirely dependent on the ultimate establishment and development of UHF (see R. 753, para. 5). In short, but for Channel 8 in New Haven (already being utilized) and Channel 3 allocated to Hartford, the entire Connecticut River Valley was exclusively UHF (see 1 RR 53:606).

Believing then, as did the Commission, that UHF would ultimately become a part of a "single" integrated system, UHF channels were applied for, grants were made, and UHF stations went on the air in Bridgeport, Hartford, New Britain and Waterbury, Conn., in Springfield, Holyoke, Worcester, Greenfield, Adams-Pittsfield, Mass., and in Albany, Troy, and Poughkeepsie, N. Y.[2]

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[1] All these cities except Hartford (VHF Channel 3) had "pre-freeze" VHF operations.

[2] At the time the instant record was compiled in December of 1956, UHF stations were still operating in each of the above-named cities except Worcester and Poughkeepsie (R. 337, 339).

Among such UHF pioneers were petitioners, Springfield Television Broadcasting Corporation and its wholly owned subsidiary Greenfield Television Broadcasting Corporation, which currently provide a UHF service to southern New Hampshire and Vermont, central Massachusetts, and northern Connecticut with the following facilities: Station WWLP, Springfield, Mass. on UHF Channel 22; station WRLP, Greenfield, Mass. on UHF Channel 32; translator stations W79AA and W81AA, Claremont and Lebanon, N. H., on UHF channels 79 and 81.

With grants of many of the VHF channels listed in the 1952 allocation table tied up for several years in comparative hearings (because of multiple applicants desiring those wider-coverage channels), UHF stations enjoyed a rapid growth in those portions of New England (and elsewhere) not surfeited with VHF signals (see R. 366). But it soon became evident, in those areas receiving *two* or more VHF signals (from stations affiliated with the two major television networks—CBS and NBC), that the UHF stations could not obtain suitable program material, that without desirable programs they had no viewing audience, and that without a viewing audience they had no revenues, with the result that set manufacturers continued to flood such areas with less expensive VHF-only receivers (see R. 331-344, 366).

Thus, by the time of the so-called Potter hearings in May and June of 1954,[1] it was becoming apparent to large segments of the television industry that the Commission's 1952 policy of intermixing VHF and UHF channels in the same area was a mistake, and that UHF stations in the larger markets were folding on the advent of a *second* VHF service and in the smaller markets on

[1] Hearings on S. 3095, "Status of UHF and Multiple Ownership of Television Stations," Subcommittee on Communications of Senate Committee on Interstate and Foreign Commerce, 83d Cong. 2d Sess., *passim*.

the advent of a *first* VHF service (R. 331-344, 366).[1] In such VHF areas UHF assignments were merely "paper allocations" and failed to provide "radio service" which the Commission is under a mandate to distribute equitably (47 U.S.C. Sec. 307(b)). It seemed apparent that if the United States was not to be limited to television on 12 rather than the 82 channels envisaged by the Sixth Report, a change in allocation concepts was necessary. It was urged that the removal of VHF channels from markets where UHF stations were providing competitive service and the utilization of the deleted VHF channels in other areas already so predominantly VHF that UHF stations could not obtain a foothold (i.e., a policy of "deintermixture") would result in substantially more competitive service throughout the United States and a more effective utilization of valuable spectrum space, in line with mandatory requirements of Sections 303(g) and [illegible](b) of the Communications Act of 1934, as amended (47 U.S.C. Secs. 303(g) and 307(b)).

Numerous petitions were accordingly filed with the Commission in the summer and fall of 1954 proposing a change in Commisison policy—from that of "intermixture" to a policy of "deintermixture." These petitions, including those filed by petitioners and by certain other UHF operators in the Connecticut Valley, requesting that Channel 3 in Hartford, Conn. be reserved for noncommercial educational use, were summarily rejected by the Commission in the fall of 1954, principally on the ground that the VHF applicants for Channel 3 had spent considerable money prosecuting their applications in reliance on the Sixth Report (11 RR 625, 628).

As a result of subsequent studies realeased by various committees of Congress, strongly intimating that "private considerations" of this nature should not be allowed to

[1] See the so-called Potter Hearings of May-June 1954 (hearings on S. 3095, 83d Cong. 2d sess.), *passim*.

outweigh the "public interest,"[1] the Commission on March 31, 1955 reconsidered its earlier actions and instituted five "pilot" rulemaking proceedings looking toward the deintermixture of various television markets, including Hartford (FCC Docket No. 11336).[2] The Commission decided, pending a resolution of those proceedings, not to complicate the picture by making additional VHF grants in areas which were predominantly UHF.

After receiving voluminous written data and hearing oral argument thereon, the Commission in three related actions of November 10, 1955 concluded that the concept of intermixture had been "basic" to the Sixth Report and that the "pilot" deintermixture proceedings should be denied as premature, *until* a general rule-making proceeding ordered that same day, in which the Commission proposed to take an over-all look at its Sixth Report, had been completed (FCC Docket No. 11532).[3] However, a majority of the Commission decided at this juncture not to postpone action in VHF comparative proceedings pending its re-examination of the Sixth Report in Docket No. 11532 (13 RR 1511, 1518, para. 11).[4]

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[1] See the so-called Plotkin and Jones Reports of February 1 and 12, 1955 (R. 281).

[2] In Docket No. 11336 it was proposed to deintermix Hartford by either reserving Channel 3 for noncommercial educational use or by shifting Channel 3 to some predominantly VHF area, e.g., Rhode Island. See 13 RR 1511, 1514 (1955).

[3] See Report and Order of November 10, 1955, 13 RR 1511, 1517 (para. 8); Memorandum Opinion and Order of November 10, 1955, 13 RR 1522, 1525 (para. 5); Notice of Proposed Rule Making, November 10, 1955 in Docket No. 11532, 20 Fed. Reg. 8501 (1955).

[4] It was this facet of the November 10, 1955 Orders—the refusal by the Commission to hold VHF comparative proceedings in abeyance while it was restudying its Sixth Report—which gave rise to the *first round* of deintermixture appeals. *Coastal Bend Television Co.* v. *FCC*, 97 U.S. App. D.C. 339, 231 F.2d 498 (1956); *ibid*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Greylock Broadcasting Co.*

Thus, after much prodding by Congress and a series of "false starts," the Commission finally concluded at long last, in its *Second Report on Deintermixture* of June 26, 1956 in FCC Docket No. 11532 (13 RR 1571), that intermixture was not producing an integrated television system, that VHF in some instances was thwarting opportunities for effective competition among a greater number of stations, and, in the words of the court below, "that the intermixture of UHF and VHF channels was, on a nationwide basis, a failure." *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957).

Pending a further study of the feasibility of ultimately moving all television into the UHF band (thus eliminating the intermixture problem), the Commission concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, *on a case-to-case basis*, whether the deletion of VHF channels in predominantly UHF areas (and the substitution of UHF channels therefor) would improve "the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1582).[1]

To that end, on June 26, 1956 (concurrently with the release of its *Second Report on Deintermixture*), the Com-

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v. *United States*, 97 U.S. App. D.C. 414, 231 F.2d 748 (1956); *Van Curler Broadcasting Corp.* v. *United States*, 98 U.S. App. D.C. 432, 236 F.2d 727 (1956); *Gerico Investment Co.* v. *United States*, 99 U.S. App. D.C. 379, 240 F.2d 410 (1957).

[1] Commissioner Doerfer dissented from the interim deintermixture conclusion thus reached by the Commission in its *Second Report on Deintermixture* (13 RR 1571, 1594-1595), on the premise that the "equitable" distribution provisions of the Communications Act (47 U.S.C. Sec. 307(b)) required the Commission to allocate VHF as well as UHF channels to major markets, and thus foreclosed the Commission from making certain markets all-UHF and others all-VHF. Commissioner Mack likewise disagreed with the "interim" portion of the *Second Report on Deintermixture* (13 RR 1571, 1593).

mission instituted some 13 proceedings to deintermix particular markets, including a proposal (FCC Docket No. 11748) to deintermix the Hartford area by shifting VHF Channel 3 to Providence, R. I. and substituting a UHF channel therefor (R. 1-2).[1] From that order Commissioners McConnaughey, Mack, and Doerfer dissented (R. 2).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's *Second Report on Deintermixture* and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted. Senate Rep't. No. 2769, 84th Cong., 2d sess. (excerpted at R. 417-423).

On December 3, 1956 petitioners submitted detailed data on the five criteria enumerated by the Commission in its June 26 Report (13 RR 1571, 1581-1582) for eliminating a VHF assignment in a predominantly UHF area (R. 277-423; see also R. 674-717). Using the Commission's own standards for computing UHF and VHF coverage, petitioners showed that every square mile of territory

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[1] The Commission further decided in its Second Report on Deintermixture (contrary to the policy which it had been following since November 10, 1955) to condition any subsequent VHF grants in these 13 markets on the outcome of the deintermixture proceedings and subject to the further proviso that no construction be begun until the deintermixture proceeding in that particular market was resolved. Accordingly, when the Commission granted Channel 3 to respondent on July 25, 1956, it did so subject to the foregoing conditions (see Case Nos. 235 and 242, Oct. Term 1958). This *volte face* by the Commission from its November 10, 1955 policies rendered moot a previous appeal taken by Springfield Television Broadcasting Corporation from the Commission's denial of a petition to intervene in the pending comparative hearing for Channel 3 in Hartford (Case No. 13,311, U.S. App. D.C.).

which Channel 3 in Hartford would serve lies within the Grade A or B contours of at least one, and, in most instances, three or more other stations (R. 301), with the result that no "significant numbers of people would lack service as a result of the elimination" of VHF Channel 3 in Hartford (Criterion 1). Petitioners pointed out, in response to Criterion 2, that there are more UHF stations in operation in Connecticut and in central and western Massachusetts than in any area of comparable size in the United States (R. 675)—four, five, six and even seven UHF services to substantially all portions of the so-called Connecticut Valley (R. 303). In response to Criterion 3, it was shown that substantially 100% of the sets in central Massachusetts can receive UHF signals, 93% or more in Hartford, and a lesser number in the coastal portion of Connecticut (served by Channel 8 in New Haven and receiving fringe Grade B signals from VHF stations in New York City) (see R. 754). Petitioners showed that the terrain in the Connecticut Valley "was reasonably favorable for UHF coverage" (Criterion 4), as evidenced by the fact that six UHF stations are currently operating in Connecticut and central Massachusetts (R. 301, 333, 336-337) and by the fact that these stations in the Connecticut Valley have received wide public acceptance as indicated by television audience surveys (R. 319-329). It was further pointed out that except for the prefreeze station in New Haven (Channel 8), which supplies the area with a Grade A signal (R. 301), no VHF stations place better than a Grade B or fringe signal into the Connecticut Valley (R. 301, 305); that substantial communities in Connecticut and in central Massachusetts are necessarily dependent on UHF for local television outlets (R. 286-287); that in line with experience which led to the *Second Report on Deintermixture* a second VHF operation in the Connecticut Valley (Channel 3 in Hartford plus the existing VHF operation on Channel 8 in New Haven) would jeopardize existing

UHF operations and preclude further UHF expansion in that area (R. 286-287). In the light of the foregoing data, it was urged (in line with Criterion 5) that the elimination of VHF Channel 3 would improve "the opportunities for effective competition among a greater number of stations" in Connecticut and central Massachusetts (R. 279-423).

Although not strictly germane to the criteria listed in the June 26 Report for *eliminating* a VHF allocation in a predominantly UHF area (13 RR 1571, 1582), it was further pointed out that if Channel 3 were deleted in Hartford it need not go to waste—that (if not used for noncommercial educational purposes in Hartford as petitioners had proposed in 1954) it could be shifted to southern Rhode Island from whence it would provide a *Grade A* signal to substantially all of that state (including the city of Providence); that with two VHF stations in Providence UHF could not gain a foothold in that state;[1] and that Rhode Island was badly in need of a third VHF station in order that the programs of all three networks would be available to the people of that state (R. 288-289).[2] In supplemental comments petitioners submitted

[1] As the court below knew from its so-called *Channel 16 of Rhode Island* cases (Nos. 12,537 et al.), the UHF station on Channel 16 in Providence was forced to suspend operations when the *second* VHF station went on the air in Providence (see R. 342).

[2] The only formal comments (as distinguished from letters and telegrams) submitted on December 3, 1956, in opposition to the Commission's proposal to delete Channel 3 in Hartford were filed by the conditional grantee of Channel 3. The proposal to delete Channel 3 in Hartford was endorsed in the opening comments filed December 3 by WKNB-TV, by WHYN-TV, by petitioners, by ABC, by Channel 16 of Rhode Island, Inc. (WNET), by Intercity Broadcasters, Inc. (WHIM), by Capitol Television Corporation, by WWOR-TV, by WICC-TV, and by the Joint Council on Educational Television (see R. 677-679, R. 751). JCET shifted its position in its reply comments of December 28, 1956 (R. 751). WGBH-TV opposed the utilization of Channel 3 in the Providence area in the event it was shifted from Hartford (see R. 751).

data showing that if the educational station in Boston (WGBH-TV) were required to use Westinghouse's tower, "available for the use of all the VHF stations in the Boston area" (R. 734), Channel 3 could be placed on the outskirts of Providence from whence it would place a city-grade signal over all of Providence (R. 730-743).

On February 26, released March 1, 1957, the Commission (by a 4-3 vote) decided to leave Channel 3 in Hartford for commercial use and not to deintermix the Hartford-Connecticut Valley-Providence areas (R. 751-760). In reaching that result, the Commission first took up the question whether Hartford or Providence was more in need of a VHF channel, *just as it had in 1952*, without considering what effect Channel 3 in Hartford would have on the "opportunities for more effective competition among a greater number of stations" in the Connecticut Valley area (R. 756, paras. 11-12). The fact that the intervening five years had shown that intermixture was a "failure," and that 307(b) requirements could no longer be predicated on an assumption that VHF and UHF *in combination* would produce a single, integrated system was ignored. Having found that Hartford (since it had *no* VHF station whereas Providence had *two*) was more in need of a VHF channel, the Commission thus concluded that the 1952 allocation of Channel 3 to Hartford should not be disturbed (R. 756). In *further* justification of that result the Commission pointed out that, because of WGBH-TV's present site, Channel 3 (if shifted to Rhode Island) would not provide a city-grade service (although it would provide a Grade A service) over all of Providence (R. 756-757). Petitioners' request that the Commission give consideration to requiring WGBH-TV to shift its antenna to the Westinghouse tower was rejected as untimely (R. 758, para. 16). By a separate Order adopted February 27, released March 1, 1957, the Commission removed the "no construction" condition which it had originally attached to the Channel 3 grant in Hartford (R. 943).

From these adverse actions petitioners sought reconsideration under 47 U.S.C. Sec. 405 (R. 779-812), and with the Commission having revoked the "no construction" provision in the Channel 3 grant, petitioners reasserted their interest in the adjudicatory hearing for that facility (R. 781-782, 804). They highlighted the inconsistencies between the action of the majority in the Hartford case with those taken in six other cases decided the same day where a different majority of the Commission ordered deintermixture (R. 783-801). They again asked that the Connecticut Valley be further deintermixed, either by shifting Channel 3 to Rhode Island (R. 800), by reserving it in Hartford for educational use (R. 801), or by deleting Channel 3 altogether (R. 785, 789, 801). Following the denial of that petition (R. 869-872), petitioners sought review in the court below under 47 U.S.C. Secs. 402(a) and 402(b). From an affirmance thereof (Appendix A), petitioners seek certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The Commission's actions here challenged, as affirmed by the court below, are in certain respects contrary to the decisions of this Court and in other respects raise important and recurring questions which have not been but which should be resolved by this Court.

1. *The Decision Below Contravenes Congressional Policies Embodied in the Communications Act.*—On its own motion, concurrently with the release on June 26, 1956 of its *Second Report on Deintermixture* (13 RR 1571), the Commission instituted proceedings with a view to deintermixing 13 markets, and in that way rectifying to the degree possible the mistaken intermixture principle embodied in its 1952 allocation table. On March 1, 1957, as a result of those proceedings, the Commission simultaneously issued Reports and Orders (final or tentative) in eight general areas—Albany-Schenectady-Troy-Vail

Mills, N. Y. (22 FCC 293); Elmira, N. Y. (22 FCC 307); Springfield, Ill.-St. Louis, Mo.-Terre Haute, Ind. (22 FCC 318); Hartford, Conn.-Providence, R. I. (22 FCC 332); Peoria Ill.-Rock Island-Davenport, Moline, Ill.-Iowa (22 FCC 342); Madison, Wisc.-Rockford, Ill. (22 FCC 356); Fresno-Bakersfield-Santa Barbara, Cal. (22 FCC 365); and Evansville-Hatfield, Ind.-Owensboro, Louisville, Ky. (22 FCC 382). In six of those proceedings, the majority of the Commission voted to deintermix an area already predominantly UHF. In two proceedings (Hartford and Madison) a *different* majority voted not to deintermix (McConnaughey, Doerfer, Mack and Craven).

The Commission is under a mandate to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303 (g)) and "to provide a fair, efficient, and equitable distribution of radio service" among the several states and communities. Experience has shown that UHF "paper allocations" do not constitute "radio service" in VHF areas. Whether the basic policies thus set forth in the key provisions of the governing statute are or are not being effectuated by an administrative agency is a proper matter for judicial scrutiny. Unless the agency states the reasons for its action with sufficient precision and logic to enable the courts to determine whether the challenged action is or is not in furtherance of expressed congressional policy, the matter should be remanded to the agency for further proceedings. *Schaffer Transportation Co.* v. *United States*, 355 U. S. ——.

In the Hartford proceeding, as the three dissenting Commissioners (Hyde, Lee and Bartley) make clear, the action taken by the majority is, to say the least, contrary to concepts enunciated in the *Second Report on Deintermixture* and "at cross purposes" with actions taken by a different majority of the Commission in six other cases cided the same day (R. 751, 759-760). Here, although

such was the sole purpose of instituting the proceeding on June 26, 1956, the majority did *not* consider what the impact of a *second* VHF operation in the Connecticut Valley would be on UHF stations presently serving that area and on large cities in that area necessarily dependent on the survival of UHF for local outlets of their own (R. 751-758). In determining whether the Connecticut Valley or the Providence area was more in need of a service which could be rendered on Channel 3, the majority considered the problem just as they would have in 1952 and as though the *Second Report on Deintermixture* had never been issued.[1] The majority gave no consideration to the problem whether the public in Connecticut and central Massachusetts would not have more service if Channel 3 were deleted from Hartford, or if it were reserved for noncommercial educational use in Hartford, or if the transmitter site for commercial use was restricted to an area south of Hartford (R. 751-760).[2]

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[1] As properly noted by the Commission's general counsel in his brief in the court below in the *WIRL* case (No. 242, Oct. Term 1958), p. 25; "The objective of both section 307(b), and the Commission's *present* action [in the *Peoria* case] is the same, the distribution of frequencies best calculated to provide the *greatest* amount of television service to the communities involved. We are confronted with a condition not a theory. *We know in retrospect what we could not know in 1952.*"

[2] On a hasty reading of the March 1, 1957 report in the Hartford case (R. 751-760) one would gain the impression that all five criteria specified in the second deintermixture report were considered (13 RR 1571, 1582). However, if one reads the decision, after being forewarned, it becomes apparent that no mention is made of the effect which a grant of Channel 3 in *Hartford* would have on the *over-all* number of stations *in the Connecticut Valley* area (the all-important fifth criterion specified in the June 26 Report for determining whether a VHF channel should be deleted from a given area). Mention is made of what Channel 3, if it were used *elsewhere*, would do toward providing additional service. In fact, some mention is made of what it would do to some UHF stations in the Connecticut Valley if it were used in *Worcester*,

That UHF stations could not survive the advent of a *second* VHF facility in the Connecticut Valley, any more than they have elsewhere in the United States (R. 331-334, 336), has been eloquently (though unfortunately) demonstrated by subsequent developments. By the action here complained of, Channel 3 was granted to The Travelers Broadcasting Service Corporation, which commenced operating on Channel 3 in Hartford on September 23, 1957 (WTIC-TV). Even though a UHF station in Hartford (WHCT on Channel 18) was owned and operated by the Columbia Broadcasting System and thus in a position to obtain CBS programs and to insist on national and regional sponsorship thereof, CBS has recently announced that it is closing its own UHF operation in Hartford and affiliating with WTIC-TV on VHF Channel 3.[1] Petitioners' continued operation in the Connecticut Valley is likewise dependent on their retention of an affiliation with NBC. If that network, on its own or as a result of advertising pressures, transfers its affiliation to VHF Channel 8 in New Haven, Conn.,[2] petitioners would *a fortiori* be forced to terminate their UHF operations in the Connecticut Valley. Springfield, Greenfield, and Holyoke, instead of having stations of their own, would thus become dependent solely on signals from

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Mass. But, we repeat, the decision is discreetly silent on what effect Channel 3, if utilized in *Hartford*, would have on other services *in the Connecticut Valley*. Although this matter was expressly called to its attention in the petition for reconsideration (R. 780-812), the Commission again failed to face up to the problem in its Memorandum Opinion and Order denying reconsideration (R. 869-872).

[1] The full text of the press release by CBS stating its intention of terminating its UHF operation in Hartford is printed as Appendix B hereto. Under like circumstances NBC took similar action with respect to its owned-and-operated UHF station in Buffalo last June.

[2] Channel 8 in New Haven, Conn. places a Grade A signal into Springfield, Mass. (R. 301). Channel 3 in Hartford places an even stronger VHF signal into Springfield (R. 301).

outside VHF stations and would cease to have any local television outlets.[1]

Petitioners are licensees of the Commission, with limited property rights in the facilities by which they are providing a UHF service to the Connecticut Valley. *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F. 2d 793 (1948).[2] In its *Second Report on Deintermixture* and in other proceedings decided March 1, 1957, the Commission recognized that the intermixture of VHF and UHF stations in the same markets was a mistake, and that UHF stations could not compete in areas served by *two* VHF stations.[3] The Commission instituted proceedings to rectify that mistake in the Hartford area (Docket No. 11748). The utilization of Channel 3 in Hartford, since it will mean fewer UHF receivers in that area, will reduce petitioners' coverage in and around Hartford just as detrimentally as would

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[1] "Section 307(b) . . . empowers the Commission to allow licenses so as to provide a fair distribution among communities. Fairness to communities is furthered by a recognition of local needs for a community radio mouthpiece." *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 362.

[2] In this important respect the status of the instant petitioners differs from that of the petitioners in Case Nos. 235 and 242 (Oct. Term 1958), the latter being merely applicants for television facilities and not existing licensees.

[3] . . . "our experience in other markets convinces us that the advent of a *second* VHF station in a UHF market, such as Albany-Schenectady-Troy, would, in all probability, destroy the ability of existing UHF stations to continue to provide service in the area." 22 FCC 293, 302 (para. 19). Cf. Commission's brief in the court below in *WIRL Television Company* v. *United States* (Br. p. 3): "It seems clear that despite the head start of the [two] UHF stations in Peoria operation there by *one* VHF station proposed in 1952 is likely *to seriously jeopardize* the continued successful operations of one or both of the existing UHF stations as well as any real possibility of the successful development of a fourth station." See also *Channel Assignment to Columbia, S.C.*, 15 RR 1682, 1688 (1957).

a grant which creates electronic interference. *Federal Communications Commission* v. *National Broadcasting Company*, 319 U.S. 239.[1]

Because of the direct impact which the retention of Channel 3 in Hartford will have on existing UHF service in the Connecticut Valley area, petitioners were entitled (either in the so-called rule-making proceeding or in the adjudicatory hearing in which they sought to intervene) to a due process determination whether the use of Channel 3 in Hartford would serve the public interest, i.e., a decision correctly setting forth the basic facts, with rational and logical conclusions drawn therefrom. That right cannot be destroyed by *labeling* a proceeding as "rule-making" rather than "adjudicatory," where the impact of the proposed "rule" is "particular and immediate" rather than "general and future." *Philadelphia Co.* v. *Securities and Exchange Com'n*, 84 U.S. App. D.C. 73, 81, 175 F. 2d 808 (1948), dismissed as moot, 337 U.S. 901. Where agency action "necessarily affects existing rights, . . . whether by the one form of action or the other, the ordinary distinction between 'quasi-legislative' and 'quasi-judicial' action gives way before the elementary requirement that rights be not destroyed or impaired without hearing." *National Broadcasting Co.* v. *Federal Communications Commission*, 76 U.S. App. 238, 248, 132 F. 2d 545 (per Rutledge, J.), aff'd on other grounds 319 U.S. 239; *Philadelphia Co.* v. *Securities & Exchange Com'n*, 84 U.S. App. D.C. 73, 175 F. 2d 808, dismissed as moot, 337 U.S. 901; *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C.

[1] In *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217-218 this Court noted that a community might be deprived of radio service in several ways: "More powerful stations [VHF?] in nearby cities might blanket out the signals of the local station . . . One station might dominate the other with the power of its signal."

40, 46, 175 F. 2d 351; see Davis, "Requirement of a Trial-Type Hearing," 70 *Harvard Law Review* 193-280 (1956).[1]

Absent a decision which contains basic findings on relevant public interest factors presented by the parties, with rational conclusions drawn therefrom, it is not possible for a reviewing court to determine whether the agency has or has not given effect to congressional policies embodied in the governing statute, and whether the agency has or has not impaired petitioners' rights in an arbitrary and capricious fashion, and whether it has or has not considered all relevant matters presented (5 U.S.C. Sec. 1003 (b)). In such situations a remand is required so that the agency may set forth with more precision the basis of its decision. *Schaffer Transportation Co.* v. *United States*, 355 U.S. ——.

2. *The Decision Below Is in Conflict with this Court's Decision in the Chenery Case.*—In each of the eight deintermixture proceedings decided March 1, 1957 (Peoria, Springfield, Evansville, Fresno, Elmira, Schenectady, Hartford and Madison),[2] Commissioners Hyde, Lee and Bartley voted to deintermix, by removing a VHF allocation from an area which was otherwise predominantly UHF, in line with the *Second Report on Deintermixture* and the Senate Committee's endorsement thereof. In each instance, Commissioners Doerfer and Mack voted not to deintermix—Commissioner Doerfer on the ground (contrary to subsequent decisions of the court below)[3] that

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[1] Even in rule-making proceedings of *general* applicability, Section 4(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1003(b)) precludes the promulgation of a rule until "after consideration of *all relevant matters presented.*"

[2] See 22 FCC 293-395 (1957).

[3] *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235); *WIRL Television Co.* v. *United States*, 253 F.2d 863 (U.S. App. D.C., 1958), vacated by this Court on other grounds October 20, 1958 (No. 242).

Section 307(b) foreclosed the Commission from deleting wide-coverage VHF channels from major markets to which they were allocated in 1952 (13 RR 1571, 1594; 22 FCC 365, 376, 378-379 and fn. 15), and Commissioner Mack apparently because of his opposition to "piecemeal" deintermixture (13 RR 1571, 1593).

Although the 13 proceedings instituted June 26, 1957, as a result of the Second Report on Deintermixture, were designed to determine *on a case-to-case basis* whether deintermixture would or would not improve the opportunities for more effective competition among a greater number of stations (in line with 47 U.S.C. Sec. 303(g)), it is apparent from Commissioner Doerfer's dissent in Fresno (22 FCC 376, 378-379), which he made applicable to each of the other cases where deintermixture was ordered (22 FCC 376, fn. 15), that he cast his vote in each of these deintermixture cases on the erroneous *legal* premise (regardless of the particular facts of record in a given proceeding) that the Commission lacked authority (by reason of 47 U.S.C. Sec. 307(b)) to delete the one and only VHF channel allocated to that market and to substitute a UHF channel therefor.

Since a key vote (Commissioner Doerfer) against deintermixing Hartford was predicated on an erroneous legal premise,[1] the decision below affirming the Commission's 4-3 action refusing to deintermix Hartford ignored the salutary doctrine, frequently enunciated by this Court, that the validity of agency action must be determined on the grounds on which the agency itself places its decision and not on some different ground, however cogent. *Secu-*

[1] The petitioner in *Sangamon Valley Television Corp.* v. *United States* re-echoed Commissioner Doerfer's views regarding 47 U.S.C. Sec. 307(b), which the court below expressly rejected (255 F.2d 191). Although this Court has since vacated that judgment on other grounds (No. 235, Oct. Term 1958), we do not construe that action as casting doubt on that phase of the lower court's decision.

rities and Exchange Com. v. *Chenery Corp.*, 318 U.S. 80, 87-88. How Commissioner Doerfer, and perhaps Commissioner Mack, would have voted had they decided the Hartford case on *the facts of record*, uninfluenced by the *erroneous* belief that they were precluded as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from removing Channel 3 from Hartford, a court can only speculate. In such situations, under the *Chenery* doctrine, the case should be remanded to the administrative agency. Because of the impact on petitioners, of retaining Channel 3 in Hartford, petitioners were entitled to a decision predicated *on the facts developed on the record*, and not one resulting from a mistaken interpretation of the requirements laid down by Congress in 47 U.S.C. Sec. 307 (b).

The *Chenery* doctrine is especially applicable here. As the Court will note (R. 751), the majority decision of the Commission is that of two Commissioners (Doerfer and Mack). The other two on the majority side (Commissioners McConnaughey and Craven) merely concurred in the result (R. 751). Commissioners Hyde, Lee and Bartley dissented (R. 759-760). Thus, in effect, the only reasons given for the Hartford result are those of two Commissioners, who dissented from the Second Deintermixture report (13 RR 1571, 1593-1595), from the initiation of the Hartford proceeding (R. 2), and who proceeded on the erroneous *legal* premise that Section 307(b) of the Communications Act precluded the deletion of Channel 3 in Hartford.[1] In "concurring in the result" (R. 751), neither Chairman McConnaughey nor Commissioner Craven stated his reasons. Under such circumstances it is

[1] This fact no doubt explains why the decision in the *Hartford* case (unlike the Reports and Orders in the other 'deintermixture' proceedings decided the same day) did *not* consider what the impact of a *second* VHF operation in the Connecticut Valley would be on cities in that area entirely dependent on UHF for local outlets of their own.

impossible, unless effect is given to the *Chenery* doctrine, for a court to ascertain whether the decision here challenged conforms to the governing statute under which the Commission functions and whether the result is or is not "arbitrary and capricious."[1]

3. *The Decision Below Raises Important Questions Which Have Not Been but Which Should Be Resolved by This Court.*—As heretofore noted, concurrently with the release on June 26, 1956, of its *Second Report on Deintermixture*, the Commission instituted proceedings with a view to deintermixing 13 markets. The Commission made it clear that requests to deintermix other markets would be considered in due course (13 RR 1571, 1584, para. 37). On March 1, 1957, as a result of these proceedings, the Commission simultaneously issued Reports and Orders (final or tentative) in eight general areas (22 FCC 293-382).

Five of these cases have since been separately appealed to the court below, with the Commission's actions deintermixing or refusing to deintermix affirmed in each of the four cases thus far decided (Peoria, Springfield, Madison and Hartford).[2] The fifth is awaiting decision.

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[1] That Commissioners McConnaughey and Craven, in voting to keep Channel 3 in Hartford, were much influenced by the fact that Channel 3, if used in Rhode Island, would not place a city-grade signal over all of Providence is clear from their subsequent testimony before the Senate Committee on Interstate and Foreign Commerce (Hearings, "Television Inquiry," 85th Cong. 1st Sess. Part V, p. 3283). But this "reason" does not justify *affirmative* action retaining Channel 3 in Hartford, in the light of the fact that in two other cases decided the same day the VHF channel was "placed on ice" so as to preserve multiple UHF operations (22 FCC 293, 22 FCC 307).

[2] *WIRL Television Co.* v. *United States*, 253 F.2d 863 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 242, Oct. Term 1958); *Sangamon Valley Television Corp.* v. *United States*, 255 F.2d 191 (U.S. App. D.C. 1958), vacated by this Court on other grounds October 20, 1958 (No. 235,

Other deintermixture proceedings decided March 1, 1957 by the Commission (e.g., Fresno and Evansville) are awaiting "show cause" hearings under 47 U.S.C. Sec. 316 before they can be finalized by the Commission and reviewed by the courts. Requests to deintermix other areas have since been decided by the Commission and numerous petitions to deintermix still other markets are awaiting action by that agency.[2]

In short, a substantial volume of the Commission's current workload relates to proposals to improve the 1952 television allocation table by making some markets all-UHF and others all-VHF—in an effort to provide more effective competition among a greater number of stations, thereby preserving for future use the 70 UHF channels essential to a truly nationwide competitive television system.

In each of these deintermixture proceedings, because this Court has not yet spoken on these matters, substantial portions of the comments filed by interested parties deal with questions of the Commission's authority to take the action it proposes (cf. R. 4-24, 42-45, 74-77, 80-275), with diametrically opposite views expressed on the scope and limitations of Sections 303(g) and 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307 (b)), and on the need for adjudicatory hearings under Sections 303(f) and 316 of the Communications Act (47 U.S.C. Secs. 303(f) and 316), especially where the impact of a so-called "rule-making" proceeding is "particular and immediate" rather than "general and future." See *Phil-*

Oct. Term 1958); *Springfield Television Broadcasting Corp.* v. *United States*, —— F.2d —— (U.S. App. D.C. 1958); and *Winnebago Television Corp.* v. *United States*, 258 F.2d 163 (U.S. App. D.C. 1958).

[2] E.g., *Channel Assignment to Columbia, S.C.*, 15 RR 1682 (1957); *Walla Walla Deintermixture Case*, 16 RR 1636 (1958); *Channel Assignments in Pittsburgh, Pa.*, 16 RR 1558 (1957); see 22 Fed. Reg. 2050, 3127, 3185, 4365, 5613.

adelphia Co. v. Securities and Exchange Com'n, 84 U.S. App. D.C. 73, 175 F. 2d 808 (1948), dismissed as moot, 337 U.S. 901 (1949).

With individual members of the Commission themselves in disagreement over the scope and limitations of 303(g) and 307(b), as evidenced by Commissioners Hyde, Lee and Bartley voting to deintermix and with Commissioner (now Chairman) Doerfer taking the position that he is precluded as a matter of law (by reason of 47 U.S.C. Sec. 307(b)) from deleting a VHF channel in a major market (13 RR 1571, 1594; 22 FCC 378-379), the matter of the Commission's legal authority in this field is one of general importance to the broadcast industry. The Commission's precise authority on this score thus presents important and recurring questions which have not yet been but which should be decided by this Court.

Since all appeals from Commission action under Section 402(b) of the Communications Act (47 U.S.C. Sec. 402(b)) must be brought, and since most appeals under Section 402(a) of that Act (47 U.S.C. Sec. 402(a)) are brought, in the court below, the occasion for a conflict of circuits will be rare.[1] With the future course of television broadcasting (whether on VHF alone, on UHF alone, or on an intermixed or a deintermixed basis) at issue, the question of the Commission's authority to deintermix or not to deintermix given markets, and the extent to which its actions in this field are limited by Sections 303(f), 307(b) and 316 of the Communications Act (47 U.S.C. Secs. 303(f), 307(b) and 316) is a matter

[1] Since 1956 the court below has decided on the merits no fewer than nine deintermixture appeals (see cases cited in fn. 4 p. 9 and fn. 2 p. 24), in each instance affirming vacillatory results reached by the Commission. No such cases have been decided on the merits in any of the other circuits. Where, as here, the actions complained of include the Channel 3 grant to one of the respondents and a renewal grant to another (WGBH-TV), review in the court below was mandatory under 47 U.S.C. Sec. 402(b).

of sufficient and recurring public importance to merit consideration by this Court.

4. *The Decision Below Should in Any Event Be Vacated.*—On June 26, 1956, pursuant to its Second Deintermixture Report, the Commission instituted deintermixture proceedings in 13 critical television areas. On March 1, 1957, decisions were released in eight of those proceedings (including Peoria, Springfield, and Hartford). Four of those cases have been heard and affirmed by the court below. Its decision in two of those cases were vacated by this Court on October 20, 1958, because of *ex parte* presentations allegedly made to individual Commissioners in the Springfield proceeding and the interrelationship between the proceedings in Springfield and Peoria (Nos. 235 and 242, Oct. Term 1958).

The above-mentioned deintermixture decisions all stem from the Commission's *Second Report on Deintermixture*; they were considered by the Commission together, with each of these various decisions announced the same day (March 1, 1957). In the words of the court below, this case, like those, "involve[s] a phase of the UHF-VHF problem in television" (Appendix A). In short, all these deintermixture cases are closely interrelated both factually and legally.[1]

[1] In refusing to shift Channel 3 to *Providence*, because it would not (without a shift of WGBH-TV's transmitter site) provide a *city-grade* service to all of Providence, the Commission may have been influenced by the belief that it had a preferable alternative for placing a third needed VHF channel in that market. To that end it promptly instituted a new proceeding designed to place a third VHF channel in Providence. Having recently concluded that this "preferable alternative" is not feasible (FCC Mimeo. 65051), the Commission should be afforded an opportunity to compare the needs of Providence and Hartford, especially in the light of the intervening impact which the Channel 3 grant has had on UHF facilities essential to an adequate television service in the Connecticut Valley (see R. 753, para. 5). In there refusing to place a VHF channel in Springfield, Mass., it is ironical indeed in the light of its actions here challenged, that the Commission was of

With charges of *ex parte* presentations pending in at least one of these deintermixture proceedings,[1] and with the vote of resigned Commissioner Mack necessary to the result reached by the majority in the instant case, certiorari should be granted, the decision below should be vacated, and the case remanded for appropriate further proceedings (as in Nos. 235 and 242)—so that the various interrelated deintermixture cases heretofore decided by different majorities of the Commission can be resolved with some degree of logic and consistency.

WHEREFORE, it is respectfully prayed that the instant petition for writ of certiorari be granted.

Respectfully submitted,

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November 14, 1958.

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the view "that the assignment of a VHF channel to Springfield would worsen rather than improve the competitive television situation in the Springfield area and *would not solve the need of this area for multiple local outlets and service.*" (FCC Docket 11957, released October 31, 1958).

[1] It is the Commission's position that it is not limited in the discharge of its quasi-legislative responsibilities, as in cases of adjudication, to "matters presented on the record." See Commission response of October 30, 1958, in *Owensboro on the Air, Inc.* v. *Federal Communications Commission*, Case No. 13,776 et al (U.S. App. D.C.); see Brief in Opposition, *Van Curler Broadcasting Corp.* v. *United States* (No. 489, Oct. Term 1956). The record certified by the Commission to the court below in the instant proceeding is restricted to formal pleadings.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14050

SPRINGFIELD TELEVISION BROADCASTING CORPORATION and GREENFIELD TELEVISION BROADCASTING CORPORATION, APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
THE TRAVELERS BROADCASTING SERVICE CORPORATION and THE WGBH EDUCATIONAL FOUNDATION, INTERVENORS

No. 14051

SPRINGFIELD TELEVISION BROADCASTING CORPORATION and GREENFIELD TELEVISION BROADCASTING CORPORATION, PETITIONERS

v.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

THE TRAVELERS BROADCASTING SERVICE CORPORATION and THE WGBH EDUCATIONAL FOUNDATION, INTERVENORS

Petition for Review and Appeal from Orders of the Federal Communications Commission

Decided June 19, 1958

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief, for appellants in No. 14050 and petitioners in No. 14051.

Mr. Richard A. Solomon, Assistant General Counsel, Federal Communications Commission, with whom *Mr. Edgar W. Holtz*, Acting General Counsel, Federal Communications Commission, *Mr. Charles C. McCarter*, Counsel, Federal Communications Commission, and *Mr. Daniel M. Friedman*, Attorney, Department of Justice, were on the brief, for appellee in No. 14050 and respondents in No. 14051.

Mr. Percy H. Russell, with whom *Mr. Aloysius B. McCabe* was on the brief, for intervenor The Travelers Broadcasting Service Corporation.

Mr. Edgar F. Czarra, Jr., with whom *Mr. Ernest W. Jennes* was on the brief, for intervenor The WGBH Educational Foundation.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These cases are a petition to review and an appeal from orders of the Federal Communications Commission. They involve a phase of the UHF-VHF problem in television. The locale involved is a portion of the Connecticut Valley, centered about Hartford.

Allocation of UHF channels began in 1952 with the Commission's Sixth Report and Order. In the Connecticut-Rhode Island area thirteen UHF stations and four VHF stations were allocated, two of the latter to each state. Channel 3 was assigned to Hartford. The proceeding to award the license was a long comparative one and was not concluded until 1956, when Travelers Broadcasting Service Corporation, intervenor here, was awarded a construction permit. The award was originally conditional, due to the present proceedings, but the condition was later lifted.

In the meantime the licenses on the UHF channels, being without contest, were quickly awarded, and the

licensees went on the air. In 1954 petitioner-appellant Springfield Television, a UHF operator whose station is at Springfield, Massachusetts, and several other UHF operators in the general area brought proceedings seeking the deletion of the VHF Channel 3 from Hartford. Proceedings were brought twice, and twice the Commission denied deletion. Thereafter came a series of considerations by the Commission revolving about the nationwide problem of VHF-UHF competition. Among other proceedings during this time the Commission instituted a rule-making for the purpose of considering the deletion of Channel 3 from Hartford. The proposal was to shift Channel 3 from Hartford to Providence, Rhode Island, and to substitute in its place a UHF Channel 61. This would have made the Hartford area all UHF except for the one VHF station at New Haven. Proponents and opponents appeared; comments and counter-comments were filed. The Commission issued its Report and Order denying the transfer. After various procedural motions for redetermination, etc., these appeals were taken.

The essence of the contentions of petitioner-appellants is that they are existing UHF licensees in this area and that the grant of a second VHF operation at Hartford (Channel 8 being already in use at New Haven) would provide two Grade A or better VHF signals to the area, thus jeopardizing, if not destroying, petitioner-appellants' operations and depriving a number of communities, entirely dependent on UHF, of their only local outlets. Petitioner-appellants say they are entitled to have such issues "resolved" in a rational and not an arbitrary fashion. They say that, where the impact of administrative action on licensed rights is particular and immediate, existing rights cannot be destroyed except by complying with essential minima of procedural due process. They say they did not have due process here, in that the Commission failed "to face up to and rationally dispose of private and public interest matters"; it did not

consider what impact a second VHF station in the Connecticut Valley would have on existing UHF stations; and it did not consider whether the destruction of UHF operations would leave numerous substantial cities with no stations of their own (so-called "white areas"), or whether the reservation of Channel 3 for educational purposes or its complete deletion would result in more rather than less service in the Connecticut Valley and in central Massachusetts, or whether Rhode Island needed a third VHF station. They say that rules can be promulgated only after consideration of all relevant matters presented and that, when the Commission fails to mention voluminous data bearing on the public interest or to set forth a rational basis for decision, it is not possible for a reviewing court to perform its review function. They say, in summation, that the Commission's decision was unreasoned and arbitrary.

We look at the Report and Order. It contained a recitation of some basic or background material and principles and described the area involved and the existing stations. The high rate of conversion of receiver sets for UHF reception in the vicinity of Hartford indicates that UHF stations render adequate service there, but the Connecticut Valley in general is not suited for such reception on account of its wooded, rough, hilly terrain. The Commission thought, however, that this situation is not as bad as it was painted by those opposing deintermixture. The Commission said that, while on the record[1] it could not estimate with certainty whether a "white area" would exist if Channel 3 were deleted, it was "practically certain" that UHF would not approach the perfection claimed by its proponents. There are without doubt, said the Commission, terrain pockets where

[1] The Commission also pointed out that the making of a completely certain record on the point would entail prohibitive time and expense.

UHF reception would not be satisfactory, and a station at Hartford on Channel 3 would fill in those areas; and the number of persons thus affected would be substantial. There is no "white area" in Rhode Island. After some further consideration along the same line the Commission concluded that it could not say Providence had a greater need for Channel 3 or that the move would result in a fairer, more efficient and equitable distribution of facilities.

Moreover considerations of the rules respecting minimum transmitter spacings led the Commission to conclude against the move of the channel to Providence. The transmitter of a Channel 3 station operating there would have to be located so far south that it could not provide a principal city signal over all or even a greater part of the city. "This fact alone," said the Commission, "would likewise prevent the proposed assignment."

The foregoing is enough to indicate the course followed by the Commission and the nature of its determination.

In its order denying reconsideration the Commission was more succinct and emphatic. It stated its conclusion that Channel 3 in Hartford would provide service to "pockets" of white area in Connecticut and Massachusetts and would also be more likely to provide a second service to a substantial number of people. It found that the assignment to Providence or thereabouts would not compensate for the loss of service near Hartford. It recited as another important consideration the fact that the channel could not be used efficiently in Providence or in southern Rhode Island.

Before us the Commission emphasizes, rightly, that it is impossible to use rigid criteria as the basis for a decision to deintermix or not to deintermix any particular community, because of the widely varying circumstances in individual markets and the numerous factors which

bear on the choice in each area. This is a simple factual truth. The problem is an evaluation of factors, differing in each situation. Congress put that evaluation primarily in the hands of its agent, the Commission. It did not authorize the courts to reappraise the merits of such conclusions.

In respect of petitioner-appellants' contentions we must note that Channel 3 was assigned to Hartford at the same time their UHF stations were allocated there; they took their licenses with full knowledge of the situation; they are trying to change an allocation which has existed as long as have theirs. So their argument in respect to the effect of this long-delayed grant on existing operations is unimpressive. The ony difference between them is that their grants were made quickly and this one was contested by other applicants. In the next place we note that the Commission followed the procedural requirements for rule-making, and this was a rule-making proceeding. In the third place we think the conclusions of the Commission were not only rational but reasonable. The VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties. This latter seems tacitly admitted by petitioner-appellants when they suggest that this channel might be deleted entirely or reserved for educational purposes. We do not find the orders of the Commission arbitrary, unreasonable, or without ample support.

Affirmed.

BAZELON, Circuit Judge, concurs in the result. *Mackey* v. *United States and Federal Communications Comm'n* (No. 14239, decided May 22, 1958); *Coastal Bend Television Co.* v. *Federal Communications Comm'n*, 98 U.S.App. D.C. 251, 234 F.2d 686 (1956); *Van Curler Broadcasting Corp.* v. *United States*, 98 U.S.App.D.C. 432, 236 F.2d 727 (1956).

APPENDIX B

From:

COLUMBIA BROADCASTING SYSTEM, INC.
485 Madison Avenue, New York 22, N. Y.
Plaza 1-2345

October 9, 1958

CBS ANNOUNCES TELEVISION STATION CHANGES IN HARTFORD, CONNECTICUT

CBS will terminate operation of its UHF television station WHCT (Channel 18), Hartford, November 15, 1958; and at the same time, the CBS Television Network is affiliating, effective November 16, 1958, with WTIC-TV (Channel 3), Hartford, it was announced today by Frank Stanton, President, Columbia Broadcasting System, Inc. WTIC-TV is owned and operated by Travelers Broadcasting Service Corp.

In making this announcement, Dr. Stanton stated, "We have decided to terminate operations of WHCT, owned and operated by CBS for more than two years, with great reluctance and deep regret.

"WHCT has been rendering an excellent service in the immediate Hartford area. In the last year, however, two VHF stations also have been serving Hartford proper and the general Hartford area. Recently the CBS Television Network was offered the opportunity to affiliate with WTIC-TV, one of these two VHF stations, whose management has pioneered in broadcasting. To make its programs more widely available to the residents of the important Connecticut River Valley, to provide greater coverage to its network advertisers, and because of decisive network competitive considerations, the network felt compelled to affiliate with WTIC-TV while the opportunity was still available. To ignore the opportunity at

this time would have placed the network at the grave risk of a serious competitive disadvantage for the indefinite future.

"These special circumstances led to the decision to terminate operations of WHCT. It is our current intention to continue to own and operate WXIX, Channel 18, Milwaukee. This UHF television station recently shifted from Channel 19 to Channel 18, in an effort to eliminate technical interference. We anticipate that the public will receive improved reception from this move, but the full results cannot be assessed for some time. Further, the acute problem of limited availability of a VHF affiliation, present in Hartford, is absent in Milwaukee.

"CBS is still hopeful about the future of UHF. We continue to believe that in appropriate circumstances, UHF can provide a fully satisfactory and competitive service. We will seek another UHF investment to restore the full permissible station ownership quota under FCC regulations."

• • • •

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Office Supreme Court, U.S.
FILED
DEC 24 1958
JAMES R. BROWNING, Clerk

No. 516

In the Supreme Court of the United States

OCTOBER TERM, 1958

SPRINGFIELD TELEVISION BROADCASTING CORPORATION AND GREENFIELD TELEVISION BROADCASTING CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 259 F. 2d 170. The decision of the Federal Communications Commission (R. 751–760) is reported at 22 F. C. C. 332, and its order denying rehearing (R. 869–872) at 23 F. C. C. 57.

JURISDICTION

The judgment of the court of appeals affirming the orders of the Commission was entered on June 19, 1958. By order of the Chief Justice dated September

10, 1958, the time for filing a petition for certiorari was extended to November 15, 1958. The petition for a writ of certiorari was filed on November 14, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and 47 U. S. C. 402 (j).

QUESTIONS PRESENTED

1. Whether the Commission's decision not to change its prior assignment of television Channel 3 to Hartford, Connecticut, is based on adequate findings and conclusions.

2. Whether the validity of the Commission's orders is affected by its rulings in other channel reallocation proceedings or by the action of this Court in *Sangamon Valley Television Corporation* v. *United States* and *WIRL Television Company* v. *United States*, Nos. 235 and 242, this Term.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C. 151, *et seq.*, are set forth in the petition (p. 3).

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings, declined to amend Section 3.606 of its Rules (47 C. F. R. 3.606), comprising a nationwide allocation of television channels, by reassigning very high frequency (VHF) Channel 3 from Hartford, Connecticut, to Providence, Rhode Island, and by substituting ultra high frequency (UHF) Channel 61 in Hartford (R. 751–760). The Commission's action, reaffirmed on reconsideration on June 24, 1957 (R.

869–872), leaves standing the channel allocations made in 1952 in the Commission's Sixth Report and Order (1 Pike & Fischer, Radio Regulation Part III, 981:601, *et seq.*), under which 13 UHF channels were assigned to the Connecticut-Rhode Island area and two VHF channels to each state. In Connecticut VHF Channels 3 and 8 were assigned to Hartford and New Haven, respectively; in Rhode Island VHF Channels 10 and 12 were assigned to Providence (R. 753).

In allocating television channels throughout the nation in 1952, the Commission had believed it was feasible to increase the number of facilities available to particular communities by "intermixing" in the same area both the 12 available VHF channels and the 70 UHF channels. However, as a result of a general rule making proceeding (Docket No. 11532) examining the overall television allocation structure, the Commission determined in its report and order of June 26, 1956 (21 F. R. 4958, 13 Pike & Fischer, Radio Regulation 1571) that the disparity between VHF and UHF channels was such that direct competition by VHF channels frequently jeopardized the successful continuance of UHF operations. Accordingly, the Commission in its report and order gave consideration to other means of assuring an adequate national television service. The Commission determined that any effort at nationwide "deintermixture", *i. e.*, making some communities all VHF and others all UHF, would not be a feasible solution. It felt that, in view of the limited number of areas in which UHF was established, a serious public hardship would result

from any widespread enforced changeover and that, in view of terrain factors, many rural areas were necessarily dependent on VHF at the existing stage of television equipment development. After considering and rejecting other proposals which had been advanced, it concluded that a long range program of shifting all commercial television to the UHF portion of the spectrum might be the best solution of the problem.

Since effectuation of any such plan would require considerable additior study and time to overcome technical obstacles, the Commission further decided that it would consider interim action to alleviate the situation in a limited number of individual cases where this might be feasible. The Commission set forth general criteria to be considered in determining what areas would be deemed appropriate for channel shifts, but stated (13 Pike & Fischer, Radio Regulation 1571, 1582):

> Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community during the interim period.

On the same date, June 26, 1956, the Commission on its own motion issued Notices of Proposed Rule Making looking towards amendment of the Table of Assignments in some 13 areas (21 F. R. 4968–4973). One of these was to determine whether the public in-

terest would be served by transferring VHF Channel 3 from Hartford to Providence and by substituting a UHF channel in Hartford (R. 1–3). Following lengthy comments and reply comments by both proponents and opponents, the Commission on March 1, 1957, issued a report and order deciding against the transfer and on June 24, 1957 reaffirmed this decision upon reconsideration (R. 751–758, 869–872).[1] The Commission found that the deletion of Channel 3 from Hartford would deprive a substantial number of persons in Connecticut and Massachusetts of their only service, and a much larger number of a second service, because the wooded and hilly terrain in a large part of the Connecticut Valley is not suited to UHF reception (R. 755–756, 870–871).[2] This loss of service in the Hartford area, the Commission noted (R. 871, 756–757), would not be compensated for by any gain around Providence, since there are no areas of Rhode Island presently without service. In addition, the Commission found that Channel 3 could not be used

[1] On March 1, 1957 the Commission also issued decisions and orders in six of the other proceedings begun on June 26, 1956. The Commission deleted VHF channels, either finally or subject to show cause proceedings under Sections 303 (f) and 316 of the Communications Act, in Elmira, New York (22 F. C. C. 307; Springfield, Illinois (22 F. C. C. 318); Peoria, Illinois (22 F. C. C. 342); Fresno, California (22 F. C. C. 365); Evansville-Hatfield, Indiana (22 F. C. C. 382); and Albany, New York (22 F. C. C. 293). The Commission's action in Albany was subsequently changed after further rule making (23 F. C. C. 358).

[2] VHF, with its superior propagation characteristics, can provide service to pockets in the rugged terrain areas which the easily deflected UHF signals do not satisfactorily reach (R. 870–871, 755–756).

efficiently either in Providence or in other communities in southern Rhode Island (R. 871, 756–757). In order to comply with the rules regarding minimum transmitter spacings, a station operating on Channel 3 would have to locate its transmitter so far south of Providence that it would provide a city-grade signal to only a very small portion of the city, would cause adjacent channel interference, and would be seriously handicapped in competing with the two existing VHF stations in Providence and two Boston VHF stations which provide strong signals over Providence (*ibid*). In view of these circumstances, the Commission concluded that the public interest required the continued assignment of Channel 3 to Hartford (R. 758, 872).[3]

On appeal, the court of appeals unanimously affirmed the Commission's orders (Pet. App. A, 29–34). The court noted (*id.* 31–32) that petitioners' principal contention was that the Commission's decision was irrational and arbitrary because it had not found it necessary to set forth what would be the impact of a second VHF station in the Connecticut Valley on existing UHF operations. The court, after review of

[3] A comparative proceeding to award Channel 3 was pending before the Commission when rule-making was instituted. The Commission made a grant to Travelers Broadcasting Service Corporation on July 25, 1957, but conditioned the grant upon its right to substitute for Channel 3 such other channel as might be assigned to Hartford in lieu of that channel at the conclusion of the rule making proceeding, and also suspended all construction pursuant to the permit until after the rule making was concluded (R. 920). Following its determination in the rule making proceeding to adhere to the status quo, the Commission deleted these conditions (R. 919–920) and subsequently denied petitioners' petition for reconsideration (R. 921–922, 943).

the matter, held that the Commission's orders were not "arbitrary, unreasonable, or without ample support" (*id.* 34).

After summarizing the grounds upon which the Commission based its decision (*id.* 32–33), the court stated that it agreed with the Commission that it is "impossible to use rigid criteria as the basis for a decision to deintermix or not to deintermix any particular community, because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice in each area" (*id.* 33–34). The problem, said the court, was "an evaluation of factors, differing in each situation", and Congress had put such evaluation "primarily in the hands of its agent, the Commission" (*id.* 34). The court held that in the instant case the conclusions of the Commission "were not only rational but reasonable" (*ibid.*). It observed: "The VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties" (*ibid.*). And the court, after noting that petitioners were seeking a change in a VHF allocation which had been in existence as long as their own UHF allocations and that petitioners had taken licenses "with full knowledge of the situation", declared that it was not impressed by petitioners' argument as to the adverse effect on their operations if the VHF channel were allowed to remain in Hartford (*ibid.*).

ARGUMENT

1. Petitioners' primary contention that the decision below contravenes the policies of the Communications Act (Pet. 15–21) is, in substance, a contention that the

decision to retain Channel 3 in Hartford was based on inadequate findings and conclusions. This presents no issue of statutory construction or communications policy, but solely the question, determined adversely to petitioners by the court below, whether there were adequate grounds for the Commission's determination that deletion of the Hartford channel would not serve the public interest in securing optimum television service for the areas involved. More concretely, the question is whether the Commission erred as a matter of law in ruling that, even if deletion would be beneficial to existing UHF operations, deletion was not in the public interest because in that event substantial populations in terrain pockets, not reached by UHF signals, would lose a first or second service, and because there were no satisfactory alternative use for the channel. The court below held that the conclusions of the Commission were "not only rational but reasonable". Nor are its orders invalid because of failure to set forth the grounds for its action. On the question of the weight to be given to possible injury to UHF licensees if Channel 3 remained in Hartford, the Commission in its report denying reconsideration said (R. 872):

> While we are concerned with preserving UHF as a part of our nationwide television system, our primary purpose in the individual role [*sic.*] making proceedings is the effectuation of a television allocation in the particular communities and areas involved that would provide the most satisfactory service to the public. We are not endeavoring to protect particular UHF

> stations from competition, nor is our primary objective the assistance of UHF. The ultimate test comes down to whether the allocation will, in our judgment, be likely to provide the best television service to the public.

The Commission's conclusion that the factors foreclosing the proposed transfer outweighed any possible adverse impact upon existing UHF stations is "precisely the sort of question which Congress, by employing the broad language of Section 303, wished to commit to the discretion of an expert administrative agency, not the courts." *Coastal Bend Television Co.* v. *Federal Communications Commission*, 234 F. 2d 686, 690 (C. A. D. C.). Cf., *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224–225; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 202–209; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348–349.

2. The Commission's determination is not vitiated by the fact that in certain other "deintermixture" proceedings it concluded that, on their particular facts, deintermixture was in the public interest. There necessarily was variance in the relevant facts in these proceedings, leading to different conclusions. Nor is the decision vitiated by the fact that in the instant case the Commission majority included a Commissioner who had dissented from the decisions granting deintermixture. Here, the Commission's comprehensive reports (R. 751–758, 869–872) deal solely with the question of whether removal of Channel 3 from Hartford would or would not be in the public interest, and they nowhere even remotely sug-

gest that lack of statutory authority was a factor in the decision not to deintermix. Petitioners themselves recognize (Pet. 22) that "the validity of agency action must be determined on the ground on which the agency itself places its decision". We submit that this very test, and petitioners' supporting citation of *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, dispose of their contention (Pet. 21–24) based upon a Commissioner's dissents in the proceedings in which the Commission ordered deintermixture.

3. Petitioners' contention (Pet. 27–28) that the decision below should be vacated and the case remanded to the court of appeals because of the action of this Court in *Sangamon Valley Television Corporation* v. *United States* and *WIRL Television Company* v. *United States*, Nos. 235 and 242, this Term, is, we believe, without merit. There is no factual interrelationship between the Commission's decisions in those cases to delete VHF channels in Springfield and Peoria, Illinois, and its determination here, upon the basis of facts peculiar to Connecticut Valley, to leave standing the VHF allocation to Hartford. In addition, we are aware of no subsequent testimony before a Congressional Committee or other development to indicate that any *ex parte* representation was made to any Commissioner on the merits of the instant rule-making proceeding—the basis for the orders entered by this Court in *Sangamon* and *WIRL*. We submit that, in these circumstances, petitioners show no basis for vacating the judgment of the court below.

CONCLUSION

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1958.

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IN THE

Supreme Court of the United States

October Term, 1958

SPRINGFIELD TELEVISION BROADCASTING CORPORATION

and

GREENFIELD TELEVISION BROADCASTING CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
FEDERAL COMMUNICATIONS COMMISSION,
THE TRAVELERS BROADCASTING SERVICE CORPORATION,
and THE WGBH EDUCATIONAL FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE TRAVELERS BROADCASTING SERVICE CORPORATION IN OPPOSITION

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JURISDICTION

The judgment of the court below was entered on June 19, 1958. By order of the Chief Justice, the time for filing a petition for writ of certiorari was extended to November 15, 1958. The Petition was filed November 14, 1958. The time for filing a response was extended to December 29, 1958. Jurisdiction of this Court is found in 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

STATUTES INVOLVED

In addition to the statutes set forth in the Petition (p. 3), Section 4(b) of the Administrative Procedure Act, 5 U.S.C. 1003(b), provides in pertinent part as follows:

> "*Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose . . ."

QUESTIONS PRESENTED

In the opinion of Respondent, The Travelers Broadcasting Service Corporation, the Petition presents the following questions:

1. Whether the rule making proceedings resulting in the Commission's decision to leave in effect its previous allocation of Channel 3 to Hartford, Connecticut, contravened the requirements of Sections 303(g) and 307(b) of the Communications Act, as amended, 47 U.S.C. 303(g), 307(b).

2. Whether the court below properly decided that the Commission's decision was in all other respects consistent with the public interest standard and applicable statutory procedures.

3. Whether, on the facts presented, this Court's action in vacating the judgments of the court below in Nos. 235 and 242 (Oct. Term 1958) is relevant to the disposition of this case.

STATEMENT OF THE CASE

Petitioners[1] seek further review of a judgment of the court below affirming the Federal Communications Commission's decision not to disturb the allocation of very high frequency (VHF) television Channel 3 at Hartford, Connecticut, after a rule making proceeding in which it entertained comments *pro* and *contra* a proposal to amend Section 3.606 of its regulations so as to reallocate this channel to Providence, Rhode Island and substitute in its place at Hartford an ultra-high frequency (UHF) channel. The result of the action of the Commission was to leave in effect channel allocations to the central New England area originally made in 1952 as part of the nationwide television Table of Assignments promulgated at that time.

The action challenged here was but the most recent in a succession of allocation studies of the Hartford area by the Commission extending over more than a decade. At the inception of regular commercial television broadcasting after World War II, the Commission at first reserved two VHF channels (8 and 10) for use at Hartford, a city with a metropolitan area

[1] Petitioner, Greenfield Television Broadcasting Corporation, is a wholly owned subsidiary of Petitioner, Springfield Television Broadcasting Corporation.

population of more than 350,000 and the capital of Connecticut (R. 86). On May 6, 1948, July 8, 1949 and March 22, 1951, the Commission issued three different rule making notices relating to the allocation of television channels to Hartford, and other cities as well (R. 86-87). Since Travelers had been an applicant for a VHF television station at Hartford since September 10, 1947, it was vitally interested in allocations to that city. Accordingly, it participated extensively in all these proceedings by filing comments and reply comments, including detailed engineering and economic data justifying the allocation of VHF channels, including Channel 3, to Hartford (R. 86-88). On April 11, 1952, the Commission issued its "Sixth Report and Order" finalizing a nationwide allocation structure. 1 Pike and Fischer, *Radio Regulation* 91:601.[1] Because of its size and importance, the Commission concluded that Hartford required a VHF allocation, stating as follows:

> "It is our view . . . that the requests for the deletion of Channel 3 from New London in order to assign that channel to Hartford are meritorious and should be granted . . . The population of Hartford is more than 5 times the population of New London, and Hartford is presently without any VHF assignment. Moreover, the New London area would receive VHF service from stations located in Providence and New Haven; and if Hartford is assigned a VHF channel, New London would receive Grade A service from a station in Hartford. It is our view, therefore, that Channel 3 should be deleted from New London and assigned to Hartford." ("Sixth Report and Order", 1 R.R. 91:601, 91:707.)

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[1] Hereafter cited as "R.R."

In the same Report and Order, the Commission for the first time allocated a number of UHF channels to Hartford and smaller cities throughout New England and other parts of the country.

Following release of the "Sixth Report", Travelers promptly amended its long pending application for a VHF channel at Hartford to specify operation on Channel 3 (R. 87). Other applications for the same frequency were filed and a lengthy comparative hearing to ascertain the best qualified applicant ensued, which was finally terminated in favor of Travelers in July, 1956. See *The Travelers Broadcasting Service Corporation*, 12 R.R. 689. Since the UHF channels allocated in 1952 were both more plentiful and less desirable from a techical standpoint (because of the admittedly less efficient propagation characteristics of the UHF *vis-à-vis* the VHF) these channels were promptly awarded, without contest, to a number of applicants, including Springfield Television Broadcasting Corporation, which obtained an authorization to construct a station on a UHF frequency at Springfield, Massachusetts in June, 1952, and commenced operation pursuant to this permit in March, 1953.[1]

The allocation of Channel 3 to Hartford remained unchallenged until October, 1954, when Springfield

[1] Since putting its station on the air at Springfield, the Springfield Television Broadcasting Corporation has constantly expanded the scope of its UHF operations, and is now licensed to operate UHF stations in Greenfield and Worcester, Massachusetts and Claremont and Lebanon, New Hampshire (Pet. 7). Almost from the outset, it operations have been profitable (R. 837). Petitioner recently announced in the trade press that its "October billing was 30% higher than any previous month in its 5½ year history." *Broadcasting Magazine*, November 17, 1958, p. 92.

Television Broadcasting Corporation and three other existing UHF stations in the Hartford and Springfield areas, who also had received their licenses without delay or contest and who foresaw increased competition when the Channel 3 licensing proceedings were finally resolved, filed a petition for rule making asking the Commission to delete the channel from commercial use at Hartford. The basis of the request was a contention by the UHF operators that actual use of the channel would prejudice their continued operations in the same area. Action on Travelers' application had already been delayed for seven years pending the Commission's allocation studies, and Travelers opposed this petition on the ground that the relief requested was wholly arbitrary and unreasonable. After considering detailed pleadings on the matter, the Commission denied the request for rule making on December 7, 1954. *General-Times Television Corporation*, 11 R. R. 625.

A month later, the same UHF stations renewed their petition and, after further written submissions, the Commission reconsidered its original denial to the extent of ordering a formal rule making proceeding to determine whether the public interest required retention of Channel 3 at Hartford. On November 10, 1955, after full consideration of the record made in that proceeding, the Commission once again denied the request to delete Channel 3 from Hartford where it had been allocated in 1952. *First Report on Deintermixture*, 13 R. R. 1511. Concomitantly with this action, the Commission instituted a nationwide allocation proceeding to study the possibility of assisting the further development of television broadcasting in the UHF part of the spectrum. Further comments were

filed in this proceeding by numerous interested parties. It was terminated in a Report and Order adopted June 25, 1956, in which the Commission outlined proposals for a long-range program of improving its nationwide television allocation structure and, at the same time, announced its intention to consider, on an interim basis, the reallocation of specific channels in selected parts of the country in order, where necessary and feasible, to ameliorate the competitive difficulties which had been experienced in some instances by simultaneous operation of UHF and VHF stations in the same cities. *Second Report on Deintermixture,* 13 R. R. 1571. As part of this interim proposal, the Commission once again (for the third time within two years) announced that it would consider the proposals —repeatedly pressed upon it by Petitioners—to delete Channel 3 from Hartford and reallocate it to Providence, Rhode Island (where two VHF stations were already in operation). Accordingly, the Commission again instituted a formal rule making proceeding, pursuant to Section 4 of the Administrative Procedure Act, to receive comments on the merits of the Hartford "deintermixture" proposal (R. 1-3). On the same day, it issued similar rule making proposals to consider interim changes in its table of television assignments affecting twelve other areas of the United States. *Second Report on Deintermixture,* 13 R. R. 1571, 1583.

In instituting the thirteen interim "deintermixture" rule making proposals, the Commission made it clear that the merits of each were to be weighed in light of the individual circumstances surrounding the specific communities involved. The Commission stated as follows:

> "Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community." *Second Report on Deintermixture,* 13 R.R. 1571, 1582.

In response to the Commission's rule making notice, voluminous comments and reply comments on the proposal to delete Channel 3 at Hartford were filed by Petitioners, Travelers, and numerous other interested parties. These comments comprised more than 600 pages of the record before the court below (R. 80-531, 539-720).

The opponents of the deletion of Channel 3 from Hartford, including Travelers, produced written evidence showing that, without service from Channel 3, substantial numbers of television viewers residing in the hilly areas surrounding Hartford would have no television service and additional large numbers of viewers would be confined to but one service and hence have no choice of program services. In support of this conclusion, Travelers submitted numerous on-the-spot field intensity measurements, collected and analyzed by qualified engineers, showing that in actual practice the behavior of UHF television signals in the Hartford area, because of the rough terrain, falls considerably short of the coverage *theoretically* possible for UHF under favorable propagation conditions.

The opponents also pointed out that in any event the proposed reallocation of Channel 3 to Providence was an impractical solution to that city's desire for a

third competitive television station. Such a move would not enable the Channel 3 station to comply with the Commission's minimum service requirements at Providence, would have the anomalous result of creating acute electrical interference problems within the City of Providence itself—because of the proximity of stations operated in Boston—and would adversely affect one of these Boston stations, operated by Respondent WGBH Educational Foundation. Television service, not only in Providence but also in the surrounding area, would thereby be impaired.

After full consideration of the voluminous comments submitted, a majority of the Commission issued a Report and Order on March 1, 1957 in which it concluded, in a lengthy detailed opinion, that on balance the public interest required the retention of Channel 3 at Hartford in accordance with the Commission's original decision of 1952 and its repeated later refusals to delete the channel (R. 751-60).

In its opinion, the Commission first listed the parties in interest who had responded to its notice of proposed rule making, related the problem in Hartford to its overall allocation studies, and stated once again that the criteria governing proposed changes in individual communities depended upon the "widely varying circumstances" of each (R. 752). Against this general background, the Commission then went on to consider in detail the evidence which had been submitted to it and to make findings and conclusions therefrom. The Commission first analyzed the distribution of television service in the southern New England area, and pointed out that despite the proximity of numerous large cities in Connecticut and Rhode Island, considerations of electronic interference had made it

possible to allocate only five VHF channels to the entire area, of which one is allocated to Massachusetts (New Bedford), two to Rhode Island (Providence), and two to the entire State of Connecticut (one at New Haven and one at Hartford) (R. 753).

The Commission next considered the problem of conversion to UHF receivers, and found that the rate of conversion in and near Hartford and Springfield-Holyoke is practically 100 per cent, but that it falls off sharply as one leaves the metropolitan areas of Hartford and Springfield-Holyoke. Many parts of Connecticut, including such cities as Waterbury, New Haven, Bridgeport, Winsted, Danbury, Willimantic and Torrington, have very low conversion rates (R. 753-754).

The Commission then took up the question whether, if Channel 3 were deleted from Hartford, significant numbers of persons would thereby be deprived of a needed television service because of the acknowledged inferior propagation characteristics of the UHF channel which would be substituted for Channel 3. The Commission carefully weighed Travelers' engineering submissions (R. 153-275) against rebuttal evidence of a technical nature which had been submitted by Petitioners (R. 691-716) and concluded that

> "There are, without doubt, throughout the areas of rougher terrain pockets where UHF reception is not satisfactory, as is shown by the low conversion rate in Litchfield and Tolland Counties (adjoining Hartford County on the west and east) where the residents apparently prefer fringe service from VHF stations. A station operating on Channel 3 in Hartford could fill in such 'white' areas in Massachusetts as well as Connecticut to a much higher degree than could a UHF station. A

> Channel 3 station would also be more likely to provide a second service to persons now limited to one television service, either UHF or VHF. The opponents estimate that the Connecticut area so limited would be 884 square miles with a population of 103,037. While for the reasons set out above we do not believe that the number will be as great as estimated, it is our judgment that the number will be substantial in view of the rugged terrain in part of the area." (R. 756)

Further, the Commission found that no similar problem of television reception existed in Rhode Island, since all of the state received at least two Grade B television services, and the City of Providence received service not only from its two local stations but from stations in Boston as well (R. 756).

In this technical context, the Commission next considered the relative size and importance of Hartford *vis-à-vis* Providence in terms of population, market rank, and rate of growth and concluded that under the criteria of "fair, efficient and equitable" distribution of television facilities required by Section 307(b) of the Communications Act, it could not find that Providence had a greater need for Channel 3 than Hartford (R. 756).

On the basis of the foregoing considerations, the Commission concluded that a shift of Channel 3 from Hartford to Providence would not be in the public interest. It went on, nevertheless, to make findings on still other objections to the proposed move arising out of the fact that Channel 3 in any event could not be utilized at Providence consistently with its Rules and Regulations because of the impossibility of finding a transmitter site which would comply with its mini-

mum separation requirements and at the same time provide coverage to Providence (R. 756-757). Finally, in view of all the foregoing determinations, the Commission properly concluded that it was both unnecessary and inappropriate to attempt to determine whether adoption of the proposed rule making would result in improving the opportunities for effective competition among as great a number of television stations as possible in the area (R. 757).

Petitioners sought review of the Commission's decision and its order denying reconsideration thereof (R. 869-872) in the court below on the grounds that the action contravened Sections 303(g) and 307(b) of the Communications Act and that the result reached was arbitrary and capricious in view of the evidence before the Commission and the factors it deemed decisive in its review of that evidence.

The court below, in an opinion by Circuit Judge Prettyman (Circuit Judge Bazelon concurring in the result), unanimously affirmed the Commission's action as in all respects consistent with the statute and with the obligations imposed upon the agency in the discharge of its rule making functions. After detailing the factual background of the long litigation concerning television allocations at Hartford and setting forth the contentions of the parties, the court concluded as follows (Pet. App. A 34):

> "In respect of petitioner-appellants' contentions we must note that Channel 3 was assigned to Hartford at the same time their UHF stations were allocated there; they took their licenses with full knowledge of the situation; they are trying to change an allocation which has existed as long as have theirs. So their argument in respect to the

> effect of this long-delayed grant on existing operations is unimpressive. The only difference between them is that their grants were made quickly and this one was contested by other applicants. In the next place we note that the Commission followed the procedural requirements for rule making, and this was a rule making proceeding. *In the third place we think the conclusions of the Commission were not only rational but reasonable.* The VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties. * * *" (Italics supplied)

Following release of the Commission's decision to retain Channel 3 at Hartford, it issued an unconditional permit to Travelers for operation on that channel (R. 943), and Travelers constructed and put into operation the television station which it had applied for about ten years previously. This station (WTIC-TV) has been on the air at Hartford, pursuant to the Commission's decision, since September 23, 1957.

ARGUMENT

1. The Court below properly decided that the Commission's decision was within its authority and comported with applicable statutory procedures.

Petitioners' principal contention (Pet. 15-21) here, as in the Court below, is that the Commission's failure to delete Channel 3 from Hartford and reassign it to Providence was inconsistent with its statutory duty under Sections 303(g) and 307(b) of the Communications Act, 47 U.S.C. 303(g), 307(b), to "encourage the larger and more effective use of radio in the public interest" and "to provide a fair, efficient, and equitable

distribution of radio services." Petitioners allege that UHF allocations are only "paper allocations"[1] in VHF areas and argue that the Commission's decision to retain Channel 3 at Hartford, in view of its possible impact on UHF stations there and elsewhere in New England, was arbitrary and capricious. The difficulty with this position is that the record before it and the facts on which the Commission's decision to retain Channel 3 at Hartford were based show Petitioners' assumptions to be incorrect, or, at the least, inapplicable to the Hartford area.

The Commission's decision to retain Channel 3 at Hartford was based on findings and conclusions that such action was necessary in order to assure a first and second reliable television service to substantial populations residing in the areas of rough terrain surrounding Hartford, and on the equally persuasive fact that the removal of Channel 3 to Providence would actually impair *existing* television service in and north of that city from stations already operating in Boston, as well as severely limit the effective use of the new channel. These conclusions were based on extensive evidence of a technical nature in the record before it. As the court below properly found, they were "not only rational but reasonable" (Pet., App. A 34). The Commission was entitled to consider the service advantages to the people of Connecticut under the existing channel allocations to that state and the service which would be lost if Channel 3 were deleted from Hartford, and to weigh these considerations against the need for a new VHF channel at Providence

[1] Petitioners' UHF stations, profitable almost from the outset (R. 837), have surely not been "paper only".

and the special requirements for such a channel created by interference conditions. *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Company*, 289 U.S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134. The provision of service to undeserved areas is, indeed, of the essence of the Commission's considerations under Section 307(b) of the Act. *Federal Communications Commission* v. *Allentown Broadcasting Corporation*, 349 U.S. 358.

In view of these overriding service considerations, the Commission was clearly correct, under the facts before it, in rejecting Petitioners' contention that the deletion of Channel 3 was required for the future protection of its own and other UHF stations operating in the areas which would receive service from Channel 3 at Hartford. Moreover, there was no evidence in the record before the Commission to justify a conclusion that the advent of service from Channel 3 at Hartford would work the demise of these established UHF stations. The repeated contentions of Springfield Television Broadcasting Corporation (Pet. 7, 18) that its stations cannot "survive the advent of a *second* VHF facility in the Connecticut Valley" are completely at variance with the position it has strongly urged before the Commission in another proceeding. In the present case, petitioners represented that since WNHC-TV at New Haven (Channel 8) already rendered a VHF service to the Springfield area, the introduction of a Channel 3 signal at Hartford would result in competition from a *second* VHF station, which competition they could not survive. But when Springfield Television Broadcasting Corporation protested before the Commission

in December, 1957 the proposed move of the WNHC-TV (Channel 8) station approximately 14 miles closer to Springfield, it advanced the directly opposite argument that the use of Channel 3 at Hartford produces only the first VHF signal in the major portion of the service area of its stations and that the move of WNHC-TV would bring about for the first time a second competitive VHF signal. (See Protest of Springfield Broadcasting Television Corporation, *In Re Application of Triangle Publications, Inc.*, FCC Docket 12275).[1]

A further example of the complete variance of the petitioners' representations to the Commission and the courts from the real facts is shown in the recent (October 27, 1958) public statement of William L. Putnam, President of Springfield Television Broadcasting Corporation. In this public statement, made after the announcement of the affiliation of the Channel 3 Hartford station with the Columbia Broadcasting System, Inc., Mr. Putnam characterized as "pure hogwash" the claim which he himself had

[1] The protest of Springfield Television Broadcasting Corporation, filed with the Commission in opposition to the proposed move of WNHC-TV closer to Springfield (FCC Docket 12275), stated in part as follows:

> "The increased signal from WNHC-TV in Springfield proper, to the north of Springfield, and in the WWLP service area generally, will enable *many listeners to obtain for the first time a reasonably satisfactory service* from WNHC-TV, resulting in a loss of audience by WWLP to WNHC-TV. • • • In the past, the two Springfield UHF stations in competition with WNHC-TV had the advantages that WNHC-TV provided *only a Grade B signal in Springfield and not even that in significant portions of the UHF stations' coverage area.* Both of these advantages will be lost if WNHC-TV is permitted to move its transmitter site as here proposed." (Italics supplied)

frequently made and which his rival UHF station (Channel 40) at Springfield-Holyoke is now making that a UHF station in the Springfield-Holyoke market "cannot long continue" if Channel 3 is used at Hartford. Mr. Putnam further stated: "The fact that Springfield Television Broadcasting Corporation will gross more than $1 million in sales for the second year in a row should be ample evidence that we have provided and *can continue to provide successful competition to VHF stations in our market.*" (Italics supplied) He added: "And I can assure you that if I felt that WWLP could not survive VHF competition from Hartford, I would not have added another station, WRLP, nor the two translator stations we operate in northwestern New England, nor would I have revived WWOR in Worcester."[1] The stations referred to are all UHF.

Petitioners try to buttress their claim of the inability of UHF stations in the Connecticut River Valley to compete successfully with VHF stations by referring (Pet. 18 and App. B) to the present affiliation of Channel 3 at Hartford with the Columbia Broadcasting System, Inc. and by implying entirely speculatively that this affiliation will be the death knell of UHF Channel 18 in that city. But the actual events have belied this speculative forecast of doom. Following the CBS change in affiliation, several prospective buyers quickly applied for Channel 18, *even without a network affiliation,* and CBS made an agreement to sell its interest in the station to one of them for

[1] The statement of Petitioner's President, William L. Putnam, was in a letter to the Editor of *Broadcasting Magazine*, printed therein under date of October 27, 1958, p. 22. This letter is set forth in full as Appendix A.

$250,000. In the transfer application filed with the Commission, CBS stated that it had been "approached by a number of persons" who indicated a desire to buy and operate the station (Application for Assignment of License of WHCT, Hartford, Connecticut, from CBS, Inc., to Capitol Broadcasting, Inc., FCC File No. BALCT-76). This application was granted on December 23, 1958.[1]

In any event, even if Petitioners' dire predictions as to the prejudicial effect of the Commission's action on UHF television in New England were accurate, mere economic injury to Petitioners in and of itself would not have been a valid consideration for the Commission in arriving at its decision as to whether the public interest required the retention of Channel 3 at Hartford. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470.

Nor would the circumstance that its action might incidentally result in increased competition to Petitioners deprive the Commission of its authority to determine the allocation question before it in accordance with rule-making procedures conforming in all respects to the notice and hearing requirements of Section 4 of the Administrative Procedures Act, 5 U.S.C. 1003. The concepts of rule-making and adjudication "are not wholly mutually exclusive but each to a degree contains elements of the other . . . [I]t is an essence of legislation, functionally speaking, that in its immediate effect, it hurts some and benefits other members of society. . . . This is true even

[1] Another example of the ability of UHF stations in the Connecticut River Valley to command substantial prices on the market is the recent sale of WICC-AM and UHF station WICC-TV at Bridgeport, Connecticut, for a total consideration of $1,700,000 (*Broadcasting Magazine*, December 22, p. 56).

though the result of the order is of immediate and grave economic import to petitioner." *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 693-4, cert. den., 338 U.S. 860. The Commission's authority to allocate available television frequencies in the public interest through rule-making rather than adjudication is clear. *Logansport Broadcasting Corporation* v. *United States*, 210 F. 2d 24; *Peoples Broadcasting Company* v. *United States*, 209 F. 2d 286; *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194.[1]

Finally, Petitioners' contention (Pet. 16-17) that the Commission's decision was inconsistent with the results reached in other "deintermixture" proceedings involving different cities in other parts of the country is without merit. The very reason why the Commission initiated thirteen *separate* rule-making proceedings in June, 1956 was its awareness, stated at the time, that the "widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area" made it impossible to consider the interim allocation problems involved on a uniform basis. *Second Report on Deintermixture*, 13 R.R. 1571, 1582.

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[1] Petitioners' reliance (Pet. 20) on the case of *Philadelphia Company* v. *Securities and Exchange Commission*, 175 F. 2d 808, dismissed as moot, 337 U.S. 901, is misplaced. Whereas in *Philadelphia* the sole effect of the "rule-making" was to subject a single individual to immediate and extensive regulatory action, here the Commission's paramount concern and the purpose of the rule-making proceeding was to consider whether the public interest required a change in television allocations previously approved by the Commission in an important and highly populated region of the United States (New England).

2. The decision below is not inconsistent with this Court's decision in the Chenery case.

Petitioners' second argument (Pet. 21-24), to the effect that the Court below should have set the Commission's decision aside because it rested on a mistaken interpretation of the law, is also without merit. In the first *Chenery* case, this Court held that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," *Securities and Exchange Commission* v. *Chenery*, 318 U.S. 80, 87. Petitioners attempt to obscure the detailed and lengthy statement of the grounds upon which the agency's decision in the present case was based by reference to a dictum by one of the Commissioners in a dissent in another proceeding. Whatever the merits of the views attributed to Commissioner Doerfer in that case, however, they are clearly not before the Court in this. Here the agency's action in denying for the third time the request to delete Channel 3 from Hartford was based on a careful appraisal of the facts disclosed by the voluminous record before it. Its findings and conclusions went far beyond the "concise general statement" which was all that was required of it by Section 4 of the Administrative Procedure Act. *Van Curler Broadcasting Corporation* v. *Federal Communications Commission*, 236 F. 2d 727, cert. den., 352 U.S. 935. The bare legal question of the Commission's power to reallocate VHF frequencies discussed in Commissioner Doerfer's dissent in the *Fresno* case is not presented in this proceeding, since here the Commission (a) declined to make such a reallocation and (b) based its decision, not on narrow legal grounds, but on an ultimate

conclusion, supported by the record before it, that "the VHF station at Hartford had benefits for the area, and the move to Providence would have been fraught with many practical difficulties" (Pet. App. A. 34).

3. The decision below raises no questions warranting further review by this Court.

Petitioners' contention that the decision of the court below raises "important questions" requiring further review and resolution by this Court is incorrect. The Commission's decision was based primarily on its expert appraisal of technical evidence. In such a situation, even if the same record had admitted of a contrary conclusion, this Court would not be justified in disturbing the agency's exercise of its discretion. *United States* v. *WOKO, Inc.*, 329 U.S. 223. And where the Commission's appraisal of the extensive evidence before it has been reviewed and weighed in turn by the court below, which affirmatively found the Commission's conclusions not only "rational but reasonable", this Court should "adhere to the usual rule of non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Company*, 274 U.S. 543, 544; *N.L.R.B.* v. *Pittsburgh Steamship Company*, 340 U.S. 498.

Nor are there any general questions, germane to all of the Commission's allocation proceedings, which are presented or which require determination in the context of this case. The Commission's authority to promulgate regulations implementing its public interest duties under the Act is settled,

National Broadcasting v. *United States*, 319 U.S. 190; *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, and its action here was simply a further exercise of the general rule-making authority approved in the *Logansport* and *Peoples* cases, *supra*.[1]

4. This Court's action in cases Nos. 235 and 242 (Oct. Term 1958) does not require vacation of the decision of the Court below.

Petitioners' final contention (Pet. 27-28) that the decision of the Court below should in any event be vacated and the case remanded to the Commission for further proceedings because of similar action taken by this Court earlier in cases Nos. 235 and 242 is without merit. Those cases involved the reallocation of VHF Channels in the Springfield-Peoria, Illinois area allegedly predicated, at least in part, on *ex parte* presentations to the Commission not disclosed in its decision but mooted in proceedings before Congress while the appeals were pending. The present case concerns the Commission's refusal to disturb existing long-standing allocations in an entirely different part of the country for reasons peculiar to the cities involved here and in no sense relevant, factually or legally, to the situations presented in Peoria and Springfield. The court below found the Commission's conclusions "not only rational but reasonable." And here there is no suggestion, much less an allegation, of improper *ex parte* representations to the agency. Un-

[1] ". . . [T]he Sixth Report contemplated and provided for not only a present Table of Assignments but also future amendments to that Table by the assignment of additional Channels to communities under specified rules and policies." *Van Curler Broadcasting Corporation* v. *United States*, 236 F. 2d 727, cert. den., 352 U.S. 935.

der these circumstances, there is plainly no reason to vacate the judgment of the court below. The petition for certiorari should be denied, so that repose may at last enfold this protracted litigation.

CONCLUSION

The decision of the court below is clearly correct, and raises no question calling for further review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
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December 29, 1958

APPENDIX A

FROM:

Broadcasting Magazine. October 27, 1958, p. 22:

"SPEAK FOR YOURSELF

Editor:

"First, I would like to congratulate the editors of BROADCASTING for their fine editorial [Oct. 20] on the future of uhf. Not many people these days are looking beyond the scare headlines emblazoned in the average press. I am thankful that the responsible editors of your magazine have recognized the eventual need for the uhf channels in the future.

"Second, I would like to take strong exception to comments concerning uhf in the Springfield-Holyoke market made [in that same issue] by William Dwight of WHYN-TV [UHF Channel 40]. His statement to the effect that a uhf station in that area 'cannot long continue' if vhf is permitted in the Hartford area is pure hogwash. To set the record straight as a uhf operator in the Springfield-Holyoke area, I would like to say that despite the many setbacks uhf has suffered, it still is far from being dead. And I can assure you that if I felt that WWLP could not survive vhf competition from Hartford, I would not have added another station, WRLP, nor the two translator stations we operate in northwestern New England, nor would I have revived WWOR in Worcester.

"The fact that Springfield Television Broadcasting Corp. will gross more than $1 million in sales for the second year in a row should be ample evidence that we have provided and can continue to provide successful competition to vhf stations in our market. When Mr. Dwight spoke about uhf, he could only have been speaking from WHYN-TV's standpoint and not from the standpoint of either the uhf industry or stations WWLP and WRLP.

WILLIAM L. PUTNAM, President
Springfield (Mass.)
Tv Broadcasting Corp."